ELIAS MOOIN & ANOR.

v.

DATO' ZAINAL ABIDIN JOHARI

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL NO: S5-22-90-1995]
2 MAY 1997

CIVIL PROCEDURE: *Injunction - Ex parte interlocutory injunction - Life span of - Whether to lapse after two weeks - Caclulation of 'the two weeks' where there was no act to be done 'within a specific period after or from a specific date' - Whether to take effect from the day of its date - Rules of the High Court 1980, O. 3 r. 2(2), O. 29 r. 1(2B), O. 42 r. 7(1) & (2)*

CIVIL PROCEDURE: *Damages - Ex parte interlocutory injunction - Application for extension, refusal of - Injunction order allowed to lapse without any challenge by defendant - Whether there was an acceptance that injunction was properly taken out - Whether defendant excluded from claiming - Rules of the High Court 1980, O. 3 r 2(2), O. 29 r. 1(2B), O. 42 r. 7(1) & (2)*

The plaintiffs had obtained an *ex parte* interlocutory injunction against the defendant on 17 March 1995, and on 30 March 1995 they applied for its extension by way of *inter partes* summons-in-chambers. The application came before Justice Datuk Mokhtar Sidin ('the Judge') on 31 March 1995 whereupon the hearing was adjourned to 10 April 1995. The Judge did not indicate that he had extended the injunction to 10 April 1995, but nonetheless, after hearing arguments on that date, refused the plaintiff's application for extension. Following the refusal, the defendant filed a claim for damages contending that the plaintiffs were liable to pay same on account of the undertaking they gave in their affidavit. It was the defendant's further contention that the interlocutory injunction herein had lapsed on 31 March 1995 by virtue of O. 3 r. 2(2) Rules of the High Court 1980 ('RHC'), but was extended by implication by the Court to 10 April 1995.

The plaintiffs, opposing the claim, contended that there was no question of damages arising as (i) the *ex parte* injunction had expired on 30 March 1995 by virtue of O. 42 r. 7(1) & (2) RHC, and not on 31 March 1995, with the result that, when the Judge heard the application for extension on 10 April 1995, there was no longer an *ex parte* injunction for him to decide (ii) the *ex parte* injunction order did not specify their undertaking to pay any damages to the defendant.

Held:

[1] Order 3 r. 2(2) RHC reveals a precondition that there must be an act which is required to be done within a specific period or from a specific date. To determine what this act is, it is necessary that reference is made to O. 29 r. 1(2B) RHC being the particular provision where the subject matter arose.

[1a] The only acts expressed in O. 29 r. 1(2B) RHC are 'revoked' or 'set aside'. There is no expression to include 'unless otherwise extended'. In the event, when the plaintiffs made an application for extension of the *ex parte* injunction, the application constituted a fresh application for an interim injunction on an *inter parte* basis. That being so, it did not come within the ambit of O. 29 r. 1(2B) of the RHC. It follows that, under such circumstances, there cannot be an implied condition read into this rule of an act to allow the plaintiffs to apply for an extension of the *ex parte* injunction. Without any requirement of an act 'to be done within a specific period after or from a specific date' under the provision of O. 29 r. 1(2B) RHC, the period submitted for calculation by the defendant is wrong and ought to be rejected.

[2] By the calculation specified under O. 42 r. 7(1) & (2) RHC read together with O. 29 r. 1 (2B) RHC, the *ex parte* injunction terminated on 30 March 1995. Therefore, when the Judge ordered the application for extension to be struck off on 10 April 1995, there was in fact no order to be effected upon. Consequently, without the *ex parte* injunction order then in existence there can be no issue on damages since the *ex parte* injunction had automatically lapsed without any challenge by the defendant.

[3] The defendant, without putting forward any application to revoke or set aside the *ex parte* injunction within the period of two weeks upon its granting, must have accepted that that *ex parte* interim injunction was properly taken out. When this is so, he must be excluded from claiming damages for the period when it existed.

[4] The non-insertion of the plaintiffs' undertaking to pay damages in the order for the *ex parte* injunction is not fatal to the defendant's claim for damages. Such failure does not prevent the defendant from claiming on an express undertaking affirmed on the plaintiffs' affidavit. However, in the circumstances herein, and in view of the findings aforesaid, this finding on damages has become academic.

[Application for damages dismissed.]

For the plaintiff - D. Kalaimany (Nageswary with him); M/s. Kalai & Partners
For the defendant - Hj. Sulaiman (Anita Sockalingam with him); M/s. Zain & Co.

JUDGMENT

James Foong J:

On 17 March 1995, the plaintiffs obtained an *ex parte* interlocutory injunction (*ex parte* injunction) to *inter alia* restrain the defendant from participating in the activities of the ex-servicemen association. On 30 March 1995 the plaintiffs filed an application by way of summons-in-chambers, *inter parte*, to extend the interim injunction so granted until the date of hearing of the case proper. This application came before Justice Datuk Mokhtar Sidin on 31 March 1995 where both parties were represented. The hearing was adjourned to 10 April 1995. Here, Counsel for both parties informed this Court that no formal records are available to determine whether the said Judge extended the *ex parte* injunction up to the adjourned date of 10 April 1995. On 10 April 1995, the said Judge heard arguments and refused the plaintiffs' application for extension. On consequential orders, such as the issue of damages, Haji Sulaiman, Counsel for the defendant revealed that the said Judge had announced that, "he will deal with this later." Since the Judge is elevated to the Court of Appeal, this Court is left to determine this issue on damages.

The defendant claims that since the plaintiffs' application to extend the *ex parte* injunction was refused, they are entitled to damages on the undertaking of the plaintiffs to pay damages under para. 11 of their affidavit (Encl. 3).

The plaintiffs disagree on two grounds. Firstly, the *ex parte* injunction automatically expired on 30 March 1995 - thus when the said Judge heard the application for extension on 10 April 1995 there was no longer an *ex parte* injunction for him to decide. Without the existence of the *ex parte* injunction on the date of the hearing of its extension there can be no question of damages arising, even though the application for extension of the *ex parte* injunction was dismissed. Secondly, the *ex parte* injunction order (Encl. 5) does not specify the plaintiffs' undertaking to pay any damages to the defendant.

The first ground involves O. 29 r. 1 (2B) Rules of the High Court (RHC) which provides:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall be automatically lapsed at the end of two weeks from the date on which it is granted.

According to Kalai, Counsel for the plaintiffs, the "two weeks" which is 14 days ends on 30 March 1995. This is with the inclusion of the date (17 March 1995) when the *ex parte* injunction was granted. This form of calculation is provided for under O. 42 r. 7(1) and (2) RHC which reads:

> (1) A judgment or order of the Court takes effect from the day of its date.
>
> (2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, ...

Haji Sulaiman however disagrees, and insists that the *ex parte* injunction only lapsed on 31 March 1995, He relies on O. 3 r. 2(2) RHC, which allows:

> Where the act is required to be done within a specific period after or from a specific date, the period begins immediately after that date.

He argues that under O. 29 r. 1 (2B) the *ex parte* injunction will lapse after two weeks of its granting unless it is sooner revoked or set aside – this should include "unless otherwise extended", which the plaintiffs did. By reason that this act of extension is required to be done, the calculation of two weeks should begin after 17 March 1995 – this would end on 31 March 1995, by which time the *ex parte* injunction was heard and implied to be extended.

A careful perusal of O. 3 r. 2(2) RHC reveals a precondition that there must be an act which is required to be done within a specific period or from a specific date. But what is this act which is required to be performed? To determine this, one must obviously return to O. 29 r. 1 (2B) RHC, for this is the particular provision where the subject matter arose. The only acts expressed under this rule are "revoked" or "set aside". There is no expression to include "unless otherwise extended". In fact this rule should not accommodate such situation. It is meant specifically for circumstances of extreme urgency where *inter parte* hearing cannot be accommodated. Being of an *ex parte* nature, it has a short life span of only two weeks from the date it was granted. Even this could be shortened when the Court revoke or set it aside on an application by the defendant. When the plaintiffs made an application for extension of this *ex parte* injunction – for all intent and purpose, it must be considered a fresh application for an interim injunction on an *inter parte* basis. This no longer comes within the ambit of O. 29 r. 1(2B) RHC, which only provides for *ex parte* application. In fact, even the legal principles to be applicable for consideration in an application for *ex parte* injunction and that of an *inter parte* are different. Under such circumstances there cannot even be an implied condition read into this distinct rule of an act to allow the plaintiffs to apply for an extension of the *ex parte* injunction. Without any requirement of an act "to be done within a specific period after or from a specific date" under the provision of O. 29 r. 1 (2B) RHC the period submitted for calculation by the defendant is thus rejected by this Court.

By the calculation specified under O. 42 r. 7(1) and (2) RHC read together with O. 29 r. 1(2B) RHC, the *ex parte* injunction terminated on 30 March 1995. Thus, when the said Judge ordered the application for extension to be struck off on 10 April 1995, there was in fact no order to be affected upon. Consequently, without the *ex parte* injunction order then in existence there can be no issue on damages since the *ex parte* injunction order had automatically lapsed without any challenge by the defendant. The defendant without putting forward any application to revoke or set aside this *ex parte* injunction within the period of two weeks upon its granting must have accepted this *ex parte* interim injunction was properly taken out. When this is so, he must be excluded from claiming damages for the period when it existed. This proposition finds support in the case of *Lees v. Patterso*n [1878] Ch. 866 where it was held that the defendant was not entitled to any damages when he was arrested on an improperly obtained writ of *ne exeat* but had not moved to discharge it – thus the writ must be taken to have been properly issued.

On the second issue of the missing provision of the plaintiffs' undertaking to pay damages in the order for the *ex parte* injunction, this Court finds non insertion of this undertaking is not fatal to the defendant's claim for damages. Although such undertaking should be incorporated and forms part of the order as disclosed in Form 58 RHC, but a failure to include does not prevent the defendant from claiming on an express undertaking affirmed on the plaintiffs' affidavit, as in this case. When a Judge makes an order for an interim injunction, one relevant factor taken into consideration is the undertaking by the plaintiffs to pay damages. Though this may not be written into the order, the affidavit itself is sufficient to bind the plaintiff to pay damages when so ordered. But in the circumstances of this case, and based on the ruling on the first issue, this finding on damages becomes academic.

For the reasons aforesaid, the application for damages by the defendant must be dismissed with costs.

Reported by WA Sharif